

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-120

SEPTEMBER TERM, 2017

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| In re A.B., C.L., C.L. and L.L., | } | APPEALED FROM: |
| Juveniles | } | |
| | } | |
| | } | Superior Court, Franklin Unit, |
| | } | Family Division |
| | } | |
| | } | DOCKET NOS. 195/196/197/198-10-15 Frjv |

Trial Judge: Howard A. Kalfus
Acting Superior Judge, Specially Assigned

In the above-entitled cause, the Clerk will enter:

Mother appeals from the termination of her parental rights to minor children Cb.L., A.B., Cr.L., and L.L. We affirm.

This appeal concerns Cb.L., born in August 2004 to mother and N.C.¹; A.B., born in December 2005 to mother and W.B.; Cr.L., born in June 2009 to mother and W.B.; and L.L., born in March 2011 to mother and P.G. The Department for Children and Families (DCF) has been involved with the family since 2003 and has had an open case involving the family in every year since 2006. In 2009, Cb.L. and A.B. were taken into DCF custody along with mother’s oldest child, J.B. DCF eventually dismissed Cb.L. and A.B.’s 2009 cases but filed a termination petition with regard to J.B. Mother voluntarily relinquished parental rights to J.B. in 2011.

A new family support case was opened in 2013 after mother was allegedly substantiated for giving Cb.L. a black eye. In October 2015, DCF filed a motion for an emergency care order along with a petition alleging that Cb.L., A.B., Cr.L., and L.L. were children in need of care or supervision (CHINS). The CHINS petition alleged that the four children were not receiving adequate medical and dental care, that mother had failed to cooperate with DCF or follow through with recommended services for herself and the children, that mother continued to allow the children to have contact with A.B. and Cr.L.’s father, W.B., despite allegations of physical abuse, and that mother used excessive physical discipline with the children. The court ordered the children to be taken into DCF custody, where they have remained since.

Following a contested merits hearing held over three days in May, July, and August 2016, the court issued a written decision finding that the children were CHINS due to medical and dental neglect. The court found that the children had significant tooth decay. Cb.L.’s upper teeth were brown and broken away to the gum line. The children also had not received required immunizations. A.B., who was ten at the time of the hearing, had only been seen by a pediatrician once between 2010 and 2015. L.L., who was five years old, had only been seen for well-child

¹ We will use the fathers’ initials to preserve their confidentiality.

checks and immunizations three times since he was born. Although mother had scheduled appointments for all of the children by the time they were taken into custody in October 2015, the medical and dental neglect was so significant that it persisted beyond the filing of the petition. Mother acknowledged at the hearing that she had not met the children's medical needs.

The court found that DCF presented insufficient evidence to support its allegations of excessive physical discipline of the children and erratic driving and drug use by mother, and did not consider these allegations in its decision. The court also found insufficient evidence that W.B., mother's former domestic partner and the father of A.B. and Cr.L., presented a current risk of harm to the children. Because the CHINS determination was based on medical and dental neglect, the court did not consider the issue of mother's failure to cooperate with DCF.

In October 2016, DCF filed petitions to terminate parental rights to all four children. In November 2016, the court approved case plans with a permanency goal of adoption. A termination of parental rights hearing was held in March 2017. Prior to the hearing, L.L.'s father voluntarily relinquished his parental rights. Cb.L.'s father voluntarily relinquished his parental rights contingent on mother's rights being terminated. A.B. and Cr.L.'s father was not present but was represented by an attorney. Mother was present and was represented by counsel.

In a written decision, the court made the following findings. Mother had struggled to take responsibility for the conditions that led to the CHINS determination. She did make medical and dental appointments for the children, but only after several interventions by school and DCF personnel. Mother continually shifted blame for her circumstances onto others. She had seen various different mental health counselors over the years, but had not done so consistently enough to make progress. She had difficulty regulating her own behavior, which interfered with her ability to work with DCF and service providers. Even during the termination hearing, she continually reacted to testimony in a loud, uncontrolled manner. She was unable to accept criticism or parenting advice, resulting in her being terminated from family time coaching. Mother did not have support from family or friends who could help her with the children.

Mother missed or cancelled several shared parenting meetings and team meetings, depriving her of information regarding the children's development and wellbeing. One meeting was cancelled because mother threatened to punch a DCF worker. Mother unilaterally cancelled another meeting because not all of the foster parents were able to attend. While at team meetings, mother was sometimes unable to control her temper, and screamed at foster parents and DCF personnel and left meetings early. Mother had participated in several parenting classes and a trauma group since the children entered DCF custody, but did not seem to have made any progress in her parenting skills as a result.

Mother has a criminal history dating back to 1997. She has been convicted of seven misdemeanors including five that involved assault. The most recent conviction was for simple assault on W.B.'s girlfriend in 2014. At the time of the hearing, mother had no driver's license and was unemployed. She testified that her home was adequate and appropriate for the children, but she had not permitted DCF to inspect the home.

Cb.L., the oldest boy, has lived with his paternal grandmother and her partner since the end of October 2015, and appears to be thriving in their care. Although mother and Cb.L. were close and their visits seemed to go well, Cb.L. continued to need mental health counseling and dental and medical appointments. The court found that mother's inability to regulate her own emotions would interfere with the relationships she needed to maintain with Cb.L.'s service providers, and

her failure to attend visits and shared parenting meetings undermined her ability to play a constructive role in his life.

A.B., the only girl, has significant emotional and behavioral issues including post-traumatic stress disorder that prevented her from being placed in a foster home. She engaged in self-harming behaviors including swallowing toys, marbles, and batteries, and has threatened to strangle herself. Since July 2016, she has resided at the Vermont School for Girls, a residential program that is able to provide the structure and stability she needs. A.B. has had no face-to-face contact with any member of her family since November 2016. She occasionally speaks to her mother and brothers by telephone. Mother was scheduled to visit A.B. at the school every other Sunday, but sometimes failed to attend. When that occurred, A.B. reacted very negatively. Staff at the school moved visits to weekdays so they would be adequately staffed to support A.B. when her mother no-showed. Mother did not attend the weekday visits with A.B. because it would mean missing scheduled visits with the boys. A weekend visit was permitted for A.B.'s birthday in December, but mother did not appear. The court concluded that mother played a minimal role in A.B.'s life and had chosen to focus attention on her sons to the exclusion of her daughter. It found that mother was unable to resume parenting within a reasonable amount of time in light of A.B.'s special needs and mother's ability to regulate her own emotions.

Cr.L., the second-oldest boy, lives with a foster mother who is a behavioral interventionist. Despite her skill set, she has struggled with Cr.L.'s aggressive and violent behaviors. He physically assaulted his peers at school and deliberately harmed the household pets. His negative behaviors escalated on days when a visit with his mother was scheduled. Cr.L. reported to his foster mother that he had "seven years of pain" and that mother was "responsible for all of it." His foster mother thought Cr.L. would have to go into a residential program if his behaviors did not improve. The court found that Cr.L. had ongoing contact with mother, but that mother's emotional and behavioral issues prevented her from helping Cr.L. with his issues, and may have caused Cr.L.'s problems. It determined that mother failed to play a constructive role in his life and would not be able to resume parenting Cr.L. within a reasonable amount of time.

L.L., the youngest boy, lived with a different foster mother who was able to meet all of his medical, educational, and developmental needs. He was well-adjusted to his foster home, school, and community. The court found that although L.L. had a good relationship with mother, he had lived with his foster mother during a critical age in his development and his relationship with her was more beneficial to him. The court found that mother had failed to stay informed regarding L.L.'s development and his needs by failing to attend meetings and visits, and that she was unlikely to be able to resume parenting him within a reasonable amount of time, particularly in light of his greater medical needs.

The court concluded that termination of parental rights was in the best interests of all the children, and granted the petition as to both mother and W.B.

On appeal, mother argues that the family court erred by basing its termination decision on causes and conditions not found in its CHINS merits order. She contends that the only issue properly before the court during the disposition hearing was whether the causes and conditions of the medical and dental neglect could be remedied within a reasonable amount of time.

The court may terminate parental rights in its initial disposition order if it finds by clear and convincing evidence that termination is in the best interests of the child. *In re C.P.*, 2012 VT 100, ¶ 30, 193 Vt. 29; 33 V.S.A. §§ 5114, 5318(a)(5). We will uphold the family court's findings unless they are clearly erroneous, and we will affirm its conclusions of law if they are supported

by the findings. In re D.C., 168 Vt. 1, 4 (1998). In evaluating whether termination is in the child's best interests, the family court must consider four statutory factors, with the third being the most important: (1) the child's relationship and interaction with family members, foster parents, and other significant persons; (2) the child's adjustment to his or her home, school, and community; (3) the likelihood that the parent will be able to resume parental duties within a reasonable period of time; and (4) whether the parent has played and continues to play a constructive role in the child's welfare. 33 V.S.A. § 5114(a); In re J.B., 167 Vt. 637, 639 (1998).

Under this framework, the court was not restricted to reviewing only the specific events that led to the children being taken into custody. Rather, it was required to examine all relevant circumstances to determine whether termination is in the children's best interests. The court is not limited to consideration of only the specific allegations of medical and dental neglect that supported the CHINS determination.

Courts frequently must consider events that occur between the CHINS determination and the termination hearing in evaluating whether a parent has stagnated in his or her ability to parent the child. See, e.g., In re D.C., 168 Vt. 1, 6 (1998). Evidence of events that occurred prior to the CHINS merits hearing may also be relevant to the termination proceeding. As we noted in D.C.:

[T]he argument that the only relevant evidence is that which was adjudicated at the CHINS disposition is weak. We note that new information regarding pre-merits events may surface and be directly relevant to mother's parenting abilities and the best interests of the children. Once such information is established by clear and convincing evidence in the termination proceeding, it seems counter-intuitive that the court should not acknowledge these events, and [DCF]'s objectives should not reflect them: particularly prior events that have far-reaching consequences . . . and thus cannot be said to exist only in the past.

In re D.C., 168 Vt. 1, 6 (1998). Further, because the CHINS merits hearing involves a lower standard of proof than the termination hearing, we have held that the parties are not barred from relitigating issues required to be decided by clear and convincing evidence at the termination hearing. In re J.R., 164 Vt. 267, 271 (1995).

Most of the evidence presented at the termination hearing in this case involved mother's actions and behaviors since the children were taken into custody. This information was directly relevant to the best-interests analysis. DCF also introduced evidence regarding mother's previous history with DCF and engagement with treatment providers, her physical discipline of the children, and her violent and traumatic relationship with A.B. and Cr.L.'s father W.B. These were the types of events with "far-reaching consequences" to the children that we found pertinent to the court's termination decision in In re D.C. DCF was not barred from relitigating these issues and proving them by clear and convincing evidence.

Even if issue preclusion applied in the context of this proceeding, the CHINS decision would not prevent DCF from introducing evidence at the termination hearing regarding mother's previous history with DCF, physical discipline of the children by mother, or the potential harm posed by W.B. The CHINS decision merely stated that DCF had failed to present sufficient evidence to support those allegations at the CHINS merits hearing. It did not conclusively settle these matters in mother's favor, as would be required to apply issue preclusion. See In re J.R., 164

Vt. at 269-70 (explaining that issue preclusion requires, among other elements, resolution of issue by final judgment on the merits).

Furthermore, the record does not support mother's argument that she had adequately addressed the causes and conditions that led to the CHINS determination. Repeated interventions by school and DCF personnel were required for mother to finally make essential medical and dental appointments for the children. She attended some medical appointments after the children were in custody, but missed others. When L.L.'s doctor told her to call for a prescription for new shoes for L.L.'s braces, she did not do so. L.L.'s foster mother eventually obtained the prescription instead. Mother refused to take responsibility for the lack of medical and dental care that led to the children being removed from her home, instead shifting the blame onto others. After the children were taken into DCF custody, she missed opportunities to stay informed about the children's development and needs by refusing to work productively with foster parents and DCF workers and skipping shared parenting and team meetings as well as visits with the children. These factors support the court's conclusion that she would not be able to resume parenting the children within a reasonable amount of time. The court's factual findings are supported by the evidence, and the findings in turn support the court's conclusion that termination was in the best interests of the children.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice